Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JANE PORTER-COOPER,
Petitioner/Appellant,

vs.

DALKON SHIELD CLAIMANTS TRUST,
Respondent/Appellee.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a trial judge deprive a plaintiff in a product liability case of her Seventh Amendment right to a trial by jury when, in clear violation of FRCP39(a), he (1) precludes jury consideration of the defendant's negligence, the product's defects, defendant's knowledge of the product's defects, and proximate cause, (2) makes no findings, himself, on those issues, and (3) instructs the jury on the issues of cause-in-fact and damages, only?

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STATEMENT OF THE GROUNDS ON WHICH THIS COURT HAS JURISDICTION

This matter comes before this Court for relief from the decision of the Court of Appeals for the Eighth Circuit, dated January 9, 1995, rehearing denied February 14, 1995. This decision is unofficially reported at 1995 WL 104335. The decision affirmed the trial court's denial of Plaintiff's Motion for New Trial. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

AMENDMENT VII. (1791)

In Suits at Common Law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

FED R. CIV. PROC. 38:

Rule 38. Jury Trial of Right

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue, and (2) filing the demand as required by Rule 5(d). Such demand may be indorsed upon a pleading of the party.

(c) Same: Specification of Issues. In the demand a party may specify the issues which the party wishes so tried; otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some of the issues, any other party within 10 days of service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) Waiver. The failure of a party to serve and file a demand as required by this rule constitutes a waiver by the

party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

(e) Admiralty and Maritime Claims. These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).

FED R. CIV. PROC. 39:

Rule 39. Trial by Jury or by the Court

(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

(b) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, not withstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

(c) Advisory Jury and Trial by Consent. In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

STATEMENT OF THE CASE

Petitioner, Jane Porter-Cooper (hereinafter "Porter-Cooper") seeks a new trial. The trial court divested Porter-Cooper of her Seventh Amendment right when it precluded jury consideration of a substantial part of her case.[1]

Porter-Cooper suffered severe injuries caused directly by two Dalkon Shields.[2] In 1974, three years after the first Dalkon Shield was inserted, Porter-Cooper experienced a serious and painful episode of pelvic inflammatory disease (PID). In 1976, the second Dalkon Shield, inserted shortly after removal of the first, also caused PID and forced Porter-Cooper to undergo a total abdominal hysterectomy.

Importantly, throughout Porter-Cooper's use of the Dalkon Shield, A.H. Robins had learned that its Dalkon Shield caused PID by carrying infectious fluids into the uterus.[3] Porter-Cooper pleaded, and was ready to prove, facts related to the Dalkon Shield's defects.

A federal bankruptcy court in Virginia stayed Porter-Cooper's suit until August 1993, nine (9) years after being filed. The bankruptcy proceeding spawned the "Dalkon Shield Claimants' Trust" (DSCT).

When the stay was lifted on Porter-Cooper's suit, she

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[1]"Preclusion orders" are not authorized by federal law. See, e.g., Padovani v. Bruchhausen, 293 F. 2d 546 (2nd Cir., 1961).

[2]The Dalkon Shield was an intrauterine contraceptive device (IUD) made and sold by A.H. Robins Company. Porter-Cooper filed a multi-count complaint, alleging (1) strict liability (2) negligence (3) failure to warn (4) warranty. The District Court had diversity jurisdiction, 28 U.S.C. § 1332.

[3]The nature and extent of A.H. Robin's knowledge and its failure to share that knowledge with users and physicians is extensively covered in judicial opinions, popular books and newspapers.

amended her complaint to substitute DSCT as Defendant and struck her claim for punitive damages.[4] DSCT answered with a general denial of all allegations and demanded a jury trial "on all issues so triable".[5] Later, DSCT filed its "Motion in Limine to Narrow the Factual Issues and Expedite Trial," which urged the court to limit the issues at trial to medical causation and damages. DSCT did not offer to withdraw its demand for a jury trial.

Before trial, the trial judge granted DSCT's motion "inasmuch as Plaintiff is unable to recover ...punitive or similar damages" pursuant to the bankruptcy court's order.[6] Later, he instructed the jury on medical causation (cause-in-fact) and damages, only.

In similar cases involving the Dalkon Shield, juries have awarded plaintiffs millions of dollars in actual damages for loss of organs. As a direct result of the trial court's preclusion order, the jury awarded Porter-Cooper a negligible $20,000.

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[4]This action was required by the bankruptcy court as a condition precedent to lifting the stay. Porter-Cooper, in her amended complaint, alleged (1) strict liability (2) negligence (3) failure to warn (4) warranty and (5) fraud.

[5]Such a demand could not be withdrawn by the DSCT without Porter-Cooper's consent. FRCP 38(d).

[6]The trial court's order, lawfully, could only have been based upon (1) stipulation of the parties consenting to a bench trial or (2) a provision of the Constitution or Statute of the United States barring a jury trial. FRCP 39 (a).

REASONS WHY THE QUESTION PRESENTED IS SUBSTANTIAL

The right of Porter-Cooper to a trial by jury is preserved inviolate by the Seventh Amendment and Federal Rules of Civil Procedure 38 and 39. Ignoring the plain language of federal law, the trial court imposed unconstitutional limitations upon a fundamental right of Porter-Cooper.

Given the current legislative agenda regarding "civil justice reform", the judiciary must preserve and fulfill its role as "guardian" of the fundamental right to a trial by jury. See Jacob v. New York, 315 US 752 (1941) and Galloway v. United States, 319 US 372 (1943):

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."

See also, Dimick v. Schiedt, 293 US 474, 486 (1935):

> "'[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence...any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.'"

In this case, the trial court flagrantly violated Porter-Cooper's right to a trial by jury. The Eighth Circuit, instead of scrutinizing the violation "with the utmost care," over-

looked the Seventh Amendment and sanctioned its violation.[7]

A federal trial court cannot take any issue of fact away from the jury without obedience to the specific legislative limitations upon judicial power embodied in Rule 39 of the Federal Rules of Civil Procedure. Here, the trial court took issues of fact away from the jury and completely disregarded these legislative restrictions. The trial court boldly asserted its freedom from Rule 39's limitations:

> "...inasmuch as plaintiff is unable to recover trebled, exemplary, punitive or similar damages pursuant to the Amended Administrative Order No. 1 Governing Dalkon Shield Arbitration and Litigation." (emphasis supplied)

Adminstrative Order No. 1 states:

> "No Claimant shall seek, directly or indirectly, or be awarded damages in the nature of exemplary, punitive or similar damages, or attorney's fees in any Arbitration or Litigation."

This order was binding, solely, upon Porter-Cooper. It forced her to strike her claim for punitive damages. It did not

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[7]The Eighth Circuit sanctioned the trial court's action by stating that: "The order is consistent with Federal Rule 16(c), which authorizes the court to 'take appropriate action with respect to... the formulation and simplification of the issues... [and] the avoidance of unnecessary proof and of cumulative evidence." The trial court's order, however, went far beyond the boundaries of Rule 16. It severed jury issues from a jury case. Rule 16 does not empower a court to deprive a litigant of her right to trial by jury. The Eighth Circuit's reading of Rule 16 sounds the death knell for the right to a jury trial. The Eighth Circuit's application of Rule 16 to this pretrial order effectively repeals Rules 38 and 39, and cuts the heart out of the Seventh Amendment.

empower the trial court to further whittle-away her right to a trial by jury. A trial judge has the power to firmly instruct a jury against awarding punitive damages where such damages are not authorized. The Seventh Amendent and Rule 39, however, guard against the use of preclusion orders to achieve that (or any other) purpose.

This Court has recognized that "(s)ome constitutional violations, by their very nature, cast so much doubt on the fairness of the trial process, that, as a matter of law, they can never be considered harmless." Satterwhite v. Texas, 486 US 249 (1988). While Satterwhite addressed the Sixth Amendment, Justice Rehnquist has more recently observed:

> "... the right to a jury trial was not guaranteed in order to facilitate prompt and accurate decision of lawsuits. The essence of that right lies in its insistence that a body of laymen not permanently attached to the sovereign participate along with the judge in the fact-finding necessitated by a lawsuit. And that essence is as much a part of the Seventh Amendment's guarantee in civil cases as it is of the Sixth Amendment's guarantee in criminal prosecutions."

Parklane Hosiery v. Shore, 439 US 322, 348 (1990) Justice Rehnquist, dissenting.

What could cast more "doubt on the fairness of the trial process" than a pretrial order which, in clear violation of federal law guaranteeing the right to trial by jury, prevents a civil plaintiff from having a jury decide issues which may be favorable to her? The meager award for loss of female anatomy was the expected, foreseen consequence of an unfair trial process which precluded jury consideration of factual issues potentially favorable to Porter-Cooper.

CONCLUSION

This Court's decision on this Petition for Writ of Certiorari is crucial, not only to the rights of Porter-Cooper, not only to rights of all remaining victims of the Dalkon Shield who seek redress by jury, but to all civil litigants who demand a trial by jury in the federal courts within the Eighth Circuit and beyond.

This Court should grant certiorari to settle the important questions presented by this case. The trial court radically departed from the crystal-clear requirements of federal law and such departure was erroneously sanctioned by the Eighth Circuit. Petitioner urges this Court to exercise its power of supervision to preserve the constitutional right to a trial by jury guaranteed by the Seventh Amendment.

Respectfully Submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-1887

On Appeal from the United States District Court for the Eastern District of Missouri.

JANE E. PORTER-COOPER,
Plaintiff-Appellant,

v.

DALKON SHIELD CLAIMANTS TRUST,
Defendant-Appellee.

Submitted: November 14, 1994

Filed: January 9, 1995

Before RICHARD S. ARNOLD, Chief Judge,
McMILLIAN, Circuit Judge,
and REAVLEY,* Senior Circuit Judge.

PER CURIAM.

Jane Porter-Cooper sought damages from the Dalkon Shield Claimants Trust (DSCT) for injuries allegedly sustained from two Dalkon Shield intrauterine devices she wore. The jury found that the devices had caused injury to Porter-Cooper and awarded damages. She appeals, arguing that the

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*The HONORABLE THOMAS M. REAVLEY, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

trial court erred in limiting the issues tried to the jury and excluding certain evidence. We affirm.

BACKGROUND

Porter-Cooper wore two Dalkon Shields from 1971 to 1976. She suffered bouts of pelvic inflammatory disease and underwent a hysterectomy. She sued the manufacturer of the device, A.H. Robins Company. Robins filed bankruptcy as a result of Dalkon Shield litigation. The DSCT was created to handle claims relating to the Dalkon Shield. By bankruptcy court order claimants were not allowed to seek punitive damages from the DSCT. Porter-Cooper amended her pleadings to substitute the DSCT as defendant and to delete her claims for punitive damages. She does not claim that the bankruptcy court order is invalid or that it does not limit her recovery to actual damages.

At trial Porter-Cooper claimed that the Dalkon Shields had caused her infections. The DSCT claimed that Porter-Cooper's infections were caused by venereal diseases. It also claimed that the hysterectomy was elective surgery not mandated by the use of the Dalkon Shields, and that Porter-Cooper, unmarried with two children at the time, did not want to have any more children. The jury awarded $20,000 in damages.

DISCUSSION

The DSCT filed a "motion in limine to narrow the factual issues and expedite trial," which the court granted. The motion offered to withdraw Defendant's statute of limitations defense and relieve plaintiff of the burden of proving a tort, and asked that the trial evidence be limited to the issues of causation and damages. Porter-Cooper complains of the court's pretrial order which so limited the trial to

medical causation and damages. Porter-Cooper complains of the court's pretrial order which so limited the trial to medical causation and damages. The order is consistent with Federal Rule 16(c), which authorizes the court to "take appropriate action with respect to... the formulation and simplification of the issues... [and] the avoidance of unnecessary proof and of cumulative evidence..." The timing and extent of Robins' knowledge of Dalkon Shield problems was not relevant in a cause where punitive damages were not recoverable, limitations was not a defense, and the claim was premised on strict product liability.

Couching her argument as a denial of her constitutional right to trial by jury, Cooper complains that she was not allowed to prove that Robins was aware of the dangers and problems with the Shield long before it was removed from the market, after pressure from the FDA. She wanted to present a "Dalkon Shield History" of these events, in exhibits excluded by the court. The exhibits consist of chronologies of events presented in an abbreviated form. They are allegedly based on Robins' documents. Cooper claims that these exhibits would have greatly bolstered her proof of causation. Even if these summaries were admissible, their exclusion was at most harmless error, since the jury went with her on causation.

Cooper also complains that the court erroneously excluded the testimony of two experts. Dr. Swan, according to Porter-Cooper, was going to testify on the relationship between Dalkon Shield use and the incidence of pelvic inflammatory disease and hysterectomy. Since such testimony goes to causation, its exclusion, again, was at most harmless error. Porter-Cooper argues that the second expert, Dr. Sweet, was both a causation and damage expert, but gives no explanation of how the second expert would have increased the damages awarded. Under FED. R. EVID. Rule 103 error may not be predicated on the exclusion of evidence unless there is an offer of proof providing the substance of the excluded evidence. Porter-Cooper made no such offer. She contends that her pretrial designa-

tion of Dr. Sweet's expected testimony suffices. Regarding damages, the designation states only that Dr. Sweet "may testify concerning the cause and effect of plaintiff's PID in 1971 and her PID in 1976." Such a statement is not an adequate offer of proof. An offer of proof is inadequate if "[t]here is nothing in the offer that would apprise the district court that the proffered testimony was anything but cumulative." *Strong v. Mercantile Trust Co.*, 816 F.2d 429, 431 (8th Cir.1987), cert. denied, 484 U.S. 1030 (1988). Instead, the offer must express "precisely the substance of the excluded evidence," which counsel accomplishes "by stating with specificity what he or she anticipates will be the witness' testimony" or by putting the witness on the stand. Id. at 432 & n.4.

AFFIRMED

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 85-0614C (6)

JANE E. PORTER-COOPER,
Plaintiff,

vs.

DALKON SHIELD CLAIMANT'S TRUST,
Defendant.

ORDER

This matter if before the Court on plaintiff's motion for a new trial, to alter or amend the judgment, for additur, and/or judgment notwithstanding the verdict. Defendant opposes the motion. After consideration,

IT IS HEREBY ORDERED that plaintiff's motion for a new trial, to alter or amend the judgment, for additur, and/or judgment notwithstanding the verdict is denied.

Dated this 17th day of March, 1994.

/s/ GEORGE F. GUNN, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 85-0614C (6)

JANE PORTER-COOPER,
Plaintiff

vs.

DALKON SHIELD CLAIMANTS TRUST,
Defendant.

ORDER

This matter is before the Court on defendant Dalkon Shield Claimants Trust's motion in limine to narrow the factual issues and expedite trial. Plaintiff has filed opposition thereto.

Defendant in its motion lists several proposed stipulations, offers to give up its affirmative defense of limitations and requests the Court to limit the contested factual issues to medical causation and compensatory damages.

Upon careful consideration,

IT IS HEREBY ORDERED that defendant's motion in limine to narrow the factual issues and expedite trial shall be and it is granted inasmuch as plaintiff is unable to recover trebled, exemplary, punitive or similar damages pursuant to the Amended Administrative Order No. 1 Governing Dalkon Shield Arbitration and Litigation.

Dated this 12th day of August 1993.

/s/ GEORGE F. GUNN, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-1887EMSL

Appeal from the United States District Court
for the Eastern District of Missouri

Jane E. Porter-Cooper,
Appellant,

v.

Dalkon Shield Claimants Trust,
Appellee.

The petition for rehearing filed by the appellant has been considered by the court and is denied.

February 14, 1995

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit